United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/affidavit of mailing

75-1405

B
P/S

To be argued by
STANLEY A. TEITLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1405

UNITED STATES OF AMERICA,

Appellee,

—against—

ALGIS GALE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
STANLEY A. TEITLER,
Assistant United States Attorneys,
Of Counsel.

V

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1405

UNITED STATES OF AMERICA,

Appellee,

—against—

ALGIS GALE,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Algis Gale appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Bramwell, *J.*), entered November 7, 1975, which judgment convicted appellant, after a jury trial, of knowingly and wilfully making fraudulent statements as to material facts in applications submitted to the Veterans Administration (Count Two) and Federal Housing Administration (Counts Three and Four) in violation of Title 18, United States Code, Sections 1001, 1010.[1] Judge Bramwell sentenced appellant to concurrent imprisonment terms of two years on each of Counts Two, Three and Four of the indictment. Appellant is presently free on bail pending this appeal.

---

[1] Count One of the indictment which also charged violations of 18 U.S.C. Sections 1001, 1010, was dismissed on motion of the Government during trial.

The following contentions are raised on this appeal: (1) that the Court erred, after dismissing Count One of the indictment, by instructing the jury that the Government intended to prove the charge through evidence of prior similar acts; (2) that the Court erred in allowing testimony regarding appellant's participation in the collection of certain rents; (3) that the Government failed to prove that appellant was responsible for the employment records as charged in the indictment, (4) that there was undue pre-indictment delay; and (5) appellant disputes the sufficiency of the Government's evidence.

Statement of the Case

A. The indictment

Count Two of the indictment charged that on or about March 2, 1972, appellant knowingly and wilfully caused to be made a false statement to the Veterans Administration ("VA") in that he caused to be stated in an application for mortgage insurance that Otha Wray Muskelly, Jr., was employed by Florence Fashions and received an annual salary of $14,000.00, knowing this to be false.

Count Three of the indictment charged that on or about March 11, 1971, appellant caused to be made a false statement, that Guillermo Cuevas was employed as the export sales manager for Los Antillas Motors at a monthly income of $1,950.00, contained in a Federal Housing Administration ("FHA") mortgage insurance application pertaining to premises located at 719A Quincy Street, Brooklyn, New York.

Count Four of the indictment charged appellant with participation in the making of a false statement to the FHA on or about January 5, 1971, by causing a mort-

gage application to be filed pertaining to realty located at 183 Calvert Street in Brooklyn. This application recited that Charles Jackson, Jr., was employed at the S & S Corporation.

Appellant was also charged in each count with aiding and abetting the commission of these crimes.

B. The FHA loan applications for Guillermo Cuevas and Charles Jackson, Jr. (Counts Three and Four)

William J. Gorman, Chief of the mortgage credit section of the FHA, explained the design of the FHA to provide housing for low and medium-income citizens by insuring lenders against the potential risks of loss inherent in the lending industry (19).[2] The fulfillment of FHA's requirements that a prospective home buyer have sufficient income, credit and minimal funds on hand for a real estate closing are customarily satisfied through documentation submitted to it by various FHA certified lending institutions who, in turn, have submitted the official FHA forms to the borrower, his employer and respective financial institution (20-21). Upon review of these documents by FHA, which include, *inter alia*, (i) an application for mortgagor approval and commitment for mortgage insurance ("Form 2900-1"), (ii) a verification of employment and (iii) a sales agreement, FHA either commits itself to the lender or declines its loan guarantee (21-22, 25). If an appraisal of property is up to sufficient value, FHA issues its conditional commitment which thereafter may become firm if the home buyer's credit is satisfactory and approved. Once a prospective home purchaser consummates his real estate closing, and FHA has initially agreed to a loan guarantee, FHA issues to its approved lending institution a

---

[2] Numerical references are to pages of the trial transcript.

certification of commitment. Should the buyer ultimately default in his mortgage payment, the mortgagee surrenders the realty to FHA, FHA compensates the mortgagee for any sustained loss, and thereafter takes title to and possession of the realty (30). FHA is virtually totally dependent upon its approved lending institutions to determine the purchaser's credit (45).

1. Guillermo Cuevas and 719A Quincy Street

Sometime after January 29, 1971, FHA received its verification of employment request from Los Antillas Motors, Inc. ("Antillas"), a Brooklyn based automobile sales operation. (A-1, 23-24).[3] The form, transmitted in connection with a proposed purchase of property located at 719A Quincy Street, Brooklyn, was purportedly signed by Antillas' vice-president and noted that the potential buyer, Guillermo Cuevas, had been for three years and four months the export sales manager at Antillas (24). Cuevas' supposed annual salary was $11,400.00, exclusive of his annual $800.00 bonus (A-1, 24). His probability of continued employment was noted as "excellent" (A-1, 24). In fact, the verification recited that Cuevas was to head the entire sales division by 1972 (A-1, 24).

In addition, FHA received verification from the Banco De Ponce, Brooklyn, New York, that Mr. Cuevas had opened a savings account there on February 26, 1971 and had a balance of $400.00 (24-25). Cuevas, in his FHA form 2900-1, listed his total assets at $7,500.00 with no liabilities (A-2, 29).

In or about March, 1971, based upon and in total reliance upon the foregoing documents, the FHA issued

---

[3] Numerical references with the prefix "A" are to the Government's appendix.

its conditional commitment to the mortgagee, the Chase Manhattan Bank, through the Bedford Stuyvesant Restoration Corporation. The seller of the 719A Quincy Street premises was County Line Collateral Corporation ("County Line"), through its vice-president, George Stone (A-5, 6). The request for a conditional FHA commitment was executed by County Line through Algis J. Jurgela (33).

Guillermo Cuevas was domiciled in the United States from 1963 to 1973 (93-94). While here he lived at 24 Furman Street, Brooklyn, New York, and was never employed by Antillas; nor did he at any time sell automobiles (95-96). Cuevas originally met appellant at Antillas while he was repairing certain plumbing facilities there and it was at that time that appellant suggested that perhaps he, Cuevas, would be interested in doing reparations at the 719A Quincy Street location (98-100). Although appellant showed the house to Cuevas in an attempt to interest him in its purchase, Cuevas emphatically rejected this proposal (99-100). Appellant did, however, convince Cuevas to agree to participate in a scheme whereby Cuevas would become the nominal buyer for a sum of $800.00 (100-101).

Cuevas ultimately consented to taking title to the property, and on February 26, 1971, appellant personally placed $400.00 in the Banco De Ponce on behalf of Cuevas (101-102). Cuevas thereafter signed the appropriate FHA forms and legal papers in connection with the purchase (102-104). Appellant apparently "took care" of the substance of each form, including the verification of employment form (102, 116). While Cuevas, in accordance with appellant's scheme, did in fact appear at the closing for 719A Quincy Street with his wife and appellant on May 20, 1971, he subsequently never received rents from the home nor did he ever make any mortgage payments (107-111). Cuevas testified as to

the falsity of all of the statements made in his employment verification form and his application for an FHA loan (112-115). Despite the fact that Cuevas was the record owner of 719A Quincy Street, he never resided here (95).

Phyllis Malaret, a tenant at 719A Quincy Street, whose original 1970 lease was executed by County Line, as lessor, and signed by "A. J. Gale," testified that appellant always personally collected her rents (189-192). On February 26, 1973, well after Cuevas took title to the property, appellant negotiated a new lease with Malaret and, in her presence, appellant signed Cuevas' name to the document (194). Appellant told Malaret that he had permission to sign Cuevas' name on the rent receipts and, consequently, Malaret's welfare checks were always payable to herself and appellant (197-198).

Ruth Bony, another tenant, corroborated the testimony of Malaret. During the time of her stay at the premises, between January, 1971 and 1973 she, too, always paid rent to appellant (205-206). Sometimes appellant signed his own name to the rent receipts, and, at other times, he signed that of Cuevas (206-207).

2. Charles Jackson, Jr. and 183 Covert Street

Mr. Gorman of the FHA further explained the receipt by FHA of papers pertaining to Charles Jackson, Jr., a prospective buyer of property located at 183 Covert Street, Brooklyn, New York (34-35). Jackson's file confirmed employment at S & S Construction Corp. ("S & S"), Brooklyn, New York, at an annual base salary of $10,400., not including a $500.00 annual bonus (35-36, A-8) Jackson was listed by S & S as in its employ for three years, then, as of December 10, 1970, as a foreman and "valued employee" with excellent probability of con-

tinued employment (A-8, 36). Jackson's FHA records showed a $400.00 balance at the Peninsula National Bank and net assets of $6,600.00 (37, A-9). The seller of 183 Covert Street was Caran Operating Corp., through its vice-president, George Stone. Based upon the foregoing data, on August 3, 1970, FHA issued a conditional commitment to the mortgagee, The Delta Capital Corp.

Jackson took the stand and denied ever having been employed by S & S as stated in his FHA request for verification of employment (321). On many occasions Jackson had done construction work for appellant and appellant had discussed with him the purchase of a home at 65 Stewart Street in Brooklyn (322-323). Appellant requested Jackson to execute certain papers with respect to the purchase of the Stewart Street home (323). While Jackson never actually perfected the deal, he did, at appellant's urging, subscribe his signature to four documents submitted to him by appellant (323). Jackson's true signature later appeared on a contract of sale, an FHA application for a mortgage and other papers, including an affidavit testifying to his intention of residing at 183 Covert Street in Brooklyn (324-328). All of the statements contained in these documents were false and none of the actual closing papers were executed by Charles Jackson (324-329). As to the documents preliminarily prepared by Charles Jackson, Jr., expert testimony noted that they were not prepared by Jackson, but no conclusion was reached as to those documents pertaining to Cuevas (329-332).

C. The VA loan application for Otha Wray Muskelly, Jr. (Count Two)

Oscar Hill Starkey, chief loan processor of the VA, testified as to the various processes engaged in by the

VA in obtaining home loans for its veterans (63-68). The VA, as the FHA, has two major concerns—it must be satisfied that a veteran's credit is satisfactory and that his income bears a proper relationship to his shelter expenses (69).

The VA verification of employment form of Otha Wray Muskelly, Jr., dated March 9, 1972, listed Florence Fashions ("Florence"), 141 Main Street, East Rockaway, New York, as his employer (70-71, A-10). Mr. Muskelly was reported to have been employed by Florence for a period in excess of five years with annual compensation of $13,500, including at $500 bonus (71). Muskelly's FHA Form 2900-1 claimed that he had no liabilities (75, A-11) and the Sterling National Bank and Trust Company of Jamaica, New York, verified a savings balance of $1,750. as of March, 1972 (72). Relying on this data, the VA issued its certificate of commitment on March 22, 1972 for the purchase by Muskelly of real estate located at 668 Halsey Street, Brooklyn, New York.

Florence Mathies, a dressmaker and the owner of Florence, testified that she never employed Muskelly (218). She explained that her former husband notified her that his friend was attempting to purchase a home and that in order to be suitably qualified he, the friend, needed confirmation of additional income (219-220). She agreed to comply with her husband's request, later received in the mail the FHA verification of employment form for Muskelly, and executed it on March 9, 1972 (220). The executed form certified that Muskelly had been employed by her for a period in excess of five years at a compensation exceeding $13,000.00 (220, A-10). In addition to the conversation she had with her husband, Mrs. Mathies spoke telephonically with appellant concerning the employment verification of Muskelly (221).

Frank Mathies, former husband to Florence, confirmed the above testimony in all respects. He was directly approached and solicited by appellant to procure a veteran home buyer and was promised $500.00 in compensation from appellant if successful (228-230). Mathies told his wife that appellant was obtaining the mortgage for Muskelly and explained to her the reason for the required verification of employment form (234-235). In fact, Mathies confirmed to his wife the fact that appellant was physically obtaining the VA verification of employment form for Muskelly (240). Mathies was originally introduced to Muskelly by his (Mathies') brother, and thereafter, Mathies knew that Muskelly agreed with appellant to purchase the Halsey Street property (230, 234). Since Muskelly was apparently a chronic alcoholic, appellant told Mathies to "clean him up" for the closing (231). Although Muskelly originally appeared for the commencement of the closing, he departed in haste prior to its completion since appellant failed to pay him upon demand (231-233). Appellant was also known by Mathies as "George Stone", "Norman Ushkow" and "James Koch". At times, when Mathies collected rents for appellant, appellant signed these names on receipts in advance (242-244).

Bessie Muskelly, mother of Otha Wray Muskelly, Jr., testified that her son resided with her since 1965, at or about the time he returned from Vietnam military service (272). Muskelly never lived at 165 Bay 37 Street, Far Rockaway, New York, as indicated in his VA housing file; moreover, notwithstanding the data contained in his file, Muskelly was never married, never owned either an automobile or household goods, and was never employed by Florence, nor did Muskelly ever have an account at Sterling National Bank (273-275).

Sylvester Rowe met appellant during 1973 when he performed certain construction work for him at 668

Halsey Street in Brooklyn (277-278). While working there in the building he was introduced to Muskelly as its prospective buyer (277-279). Rowe was asked by appellant, among others, to impersonate Muskelly at the closing on the house (279). Rowe, at appellant's insistence, executed the closing documents by forging Muskelly's name on them which included a number of affidavits (279-280). Rowe so acted as a favor to appellant (286).

Joseph M. Avignone, a handwriting expert with the Federal Bureau of Investigation, explained to the jury that based upon his extensive examination of the documents submitted to him, he concluded that the FHA documents pertaining to Muskelly were prepared by the same person but clearly not by Muskelly (299-306).

D. The Defense Case

Appellant Gale put in a defense case in the hope of discrediting the Government witnesses and attempting to prove that he never physically possessed or had anything to do whatsoever with the FHA and VA employment verifications. Appellant did not testify on his own behalf but the Government did offer portions of his Grand Jury testimony on its direct case.

Diane Adams, a loan processor at the Bedford Stuyvesant Restoration Corporation, explained the general procedures utilized in filling out FHA forms. She made it clear that Cuevas' form was executed by him in blank. Alfred Devine and Rony O'Dwyer, both from credit organizations, explained that their respective firms performed credit checks on Cuevas, Muskelly and Jackson but no further probative evidence was elicited from these witnesses. Luis Berrios testified that Cuevas worked at Antillas and Ralph Gomez and Norbert Martinez claimed that they saw Cuevas at Antillas. Mario Caroile

claimed that he saw Jackson at S & S. Obviously, the defense testimony was unpersuasive.

ARGUMENT

POINT I

Appellant was not prejudiced by the Court's comment to the jury, at the inception of the trial, that Count One of the indictment having been dismissed, the Government intended to prove evidence of prior similar acts.

Appellant claims that the District Court committed reversible error at the very beginning of the trial by commenting to the jury that, although Count One of the indictment was dismissed, the Government intended to later adduce evidence of prior similar acts. The sequence of events was as follows:

On the first day of trial, July 22, 1975, after the Government's first witness completed his testimony, the Assistant United States Attorney explained to defense counsel that typographical address errors had been made in both the VA file and Count One of the indictment with respect to the property located at 413 Pennsylvania Avenue, Brooklyn (61).[4] In view of this inadvertence, the Government, outside of the jury's presence, voluntarily moved to dismiss the count. The Court summarily granted its motion (Id.). Again, still not within the hearing of the jury, the Government requested the Court to instruct the jury that the count had been dismissed as a result of an error contained in it (62).

---

[4] Both documents erroneously described the property as "412" Pennsylvania Avenue.

Thereafter, the Assistant United States Attorney requested the Court to tell the jurors that he intended to offer proof by evidence of prior similar acts in lieu of adducing direct proof on the count (Id.). The Court asked defense counsel for his position. While counsel initially objected to such an instruction he thereafter, subsequent to discussion, withdrew his objection and consented to the Court's statement (63).[5]

Appellant contends that the Court's instruction, coupled with the Government's subsequent failure to in fact put forth similar act evidence, redounded to his prejudice in that it was "extrinsic" and proved "bad character" (Appellant's Brief at 11). Even assuming that the statement was improper, appellant has failed to demonstrate any such prejudice. Moreover, the error, if any, should be regarded as harmless.

If prejudice flowed from the Court's comment as to the Government's intentions, the more compelling observation is that it was the Government rather than appellant who suffered by this isolated incident in this instance. It is more conceivable that the jury might have construed the Government's failure of proof as a potential indication of a possible weakness in its case. Obviously, however, it did not.

In any event, it is further submitted that once the Government completed its direct case, defense counsel was obligated to reassert its rights since at that point

---

[5] The Court then stated to the jury as follows:

The Court: Ladies and Gentlemen of the Jury, the Government has permitted Count One of the indictment to be dismissed. However, the Government intends to put into proof facts which would have been relevant in this particular case, and to show this situation as a prior similar act by the defendant in connection with the other counts of this indictment (64).

it conceivably may have had ground for an objection. Having failed to do so, this Court should not now entertain this claim raised for the first time on appeal. See *United States* v. *Indiviglio*, 352 F.2d 276, 279-80 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966); *United States* v. *Luster*, 342 F.2d 763, 764 (6th Cir.), *cert. denied*, 382 U.S. 819 (1965); *Johnston* v. *United States*, 254 F.2d 239, 241 (8th Cir. 1958); *Morales* v. *United States*, 373 F.2d 527 (9th Cir. 1967) (per curiam); *Johnson* v. *Patterson*, 367 F.2d 268 (10th Cir. 1966) (per curiam).

POINT II

The evidence was overwhelmingly sufficient to sustain the jury's guilty verdict.

Appellant contends that insufficient evidence was adduced in this case to support proof of his guilt beyond a reasonable doubt.[6] He claims that the jury's verdict cannot stand since the Government provided no "impartial" witnesses and "the Government's entire case implicating Gale rested upon the testimony of an unindicted group of co-conspirators" (Appellant's Brief at 22). In addition, among other things, appellant recites the absence of "positive" proof that he "did" pass, utter or publish any statement knowing the same to be false or wilfully over-

---

[6] This point responds to Point III of appellant's brief entitled "The Government failed to Prove the Appellant was Responsible for the Employment Records as charged in the Indictment" and appellant's Point V entitled "the Prosecution Failed to Prove the Appellant's Guilt Beyond a Reasonable Doubt and a Judgment of Acquittal should have been Directed." Both points, we believe, essentially address themselves to the identical legal issues.

valued any income record" (Appellant's Brief at 14). Appellant, we submit, cannot upset the jury's determination.

1. The standard of proof

This Circuit's test to determine the sufficiency of a criminal verdict was espoused by then Chief Judge Friendly in *United States* v. *Taylor*, 464 F.2d 240, 244-245 (2d Cir. 1972). The test is identical to that applied in deciding a motion for judgment of acquittal notwithstanding a guilty verdict. *Curley* v. *United States*, 160 F.2d 229, 232-33 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). This Court must determine whether the evidence presented to the jury provided sufficient basis for a reasonable mind to

> ". . . fairly conclude guilt beyond a reasonable doubt. . . [I]f there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the [Rule 29] motion must be granted. If [the Court] concludes that either of two results, a reasonable doubt or no reasonable doubt, is fairly possible, [it] must let the jury decide the matter." *United States* v. *Taylor*, *supra* at 244-245.

Moreover, in determining the sufficiency of the evidence, conflicts between witnesses must be resolved in favor of the Government, and the total evidence adduced must be examined in the light most favorable to it. *United States* v. *Glasser*, 315 U.S. 60, 80 (1942).

According to appellant, the jury could not have possibly credited anything Cuevas said. Yet, they had the opportunity to see and hear both Cuevas and the other Government witnesses testify. This weighing of the credibility of the witnesses speaks for itself.

Appellant argues that he was not "responsible" for the employment records (Appellant's Brief at 14). The

thrust of this assertion seems to be based upon an unfounded notion that the Government must prove its case by direct evidence. Appellant in reality seeks a ruling that a guilty verdict may not rest upon the uncorroborated testimony of accomplices in light of this Court's decision in *United States* v. *Taylor*, 464 F.2d 240 (2d Cir. 1972). This Court most recently responded precisely to this thesis in *United States* v. *Bernstein*, — F.2d — (2d Cir. slip op. 6631, 6656; decided March 4, 1976) by noting that:

> In Taylor, however, this court expressly limited itself to overruling *United States* v. *Feinberg*, 140 F.2d 592 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944), which had held that the quality of evidence necessary to send a case to the jury in a criminal case was the same as in civil cases. There was no discussion in *Taylor* concerning the use of accomplice testimony, and, indeed, this court has consistently held that conviction upon such testimony is proper. *See, e.g., United States* v. *Messina*, 481 F.2d 878, 881 (2d Cir. 1973), *cert. denied*, 414 U.S. 1145 (1974); *United States* v. *Ferrara*, 458 F.2d 868, 871 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972).

2. The quality of proof

Contrary to appellant's position, this Circuit does not require that the Government's be proof "positive". Where an essential element of a crime has been proven by circumstantial evidence, the evidence need not exclude every reasonable hypothesis inconsistent with the guilt of the defendant. The jury may draw a particular inference in support of an essential allegation even though an opposite inference may be drawn from the evidence and proof. In considering the totality of the case the jury may "color" any one fact with the other facts adduced. *United States* v. *Taylor, supra* at 244-45.

The critical element of the offenses charged here is the mental state of *knowingly* making false statements. *United States* v. *Bernstein*, *supra* at 6648. The "core of the criminality" is not the substance of the false statements but rather that knowing falsehoods were submitted. *Id.* Indeed, both the direct and circumstantial evidence in this case compel the verdict returned.

Algis Gale was self-admittedly a real estate mover, an entrepreneur who closed approximately one hundred homes each year (172). He himself described his activities as those of an "operator", a "money lender" and an "investor" (91). Appellant was energetically engaged in the business of buying properties at low purchase prices and then setting sales prices in excess of and in accordance with their FHA or VA mortgage value plus the known required down payment (T. 91-93). According to appellant's own testimony, in order to obtain a fair profit "it would pay . . . to look for a buyer who would be qualified to close, and you did not care whether he was rich or poor, or black or white, or whatever he was" (T. 92). The accrued profit on each of appellant's deals amounted to approximately $2,500 (92). It is submitted that appellant, in his own testimony, corroborated much of the Government's case, and, in large part, as the record amply reveals, his testimony was unworthy of belief. As stated in *United States* v. *White*, 486 F.2d 204, 207 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974), this case is one in which "proof of guilt was clear and convincing [and] the verdict was ensured by the defendant's words . . ." See also, *United States* v. *Lubrano*, — F.2d — (2d Cir. slip op. 1361; decided December 30, 1975). In fact, the proof showed beyond any doubt that each scintilla of the Government's proof both substantiated Gale's scheme and was entirely consistent with his *modus operandi*.

The Government's proof established that appellant personally knew each of the FHA and VA applicants; appellant knew their respective stations in life and, most significantly, he knew where they were employed. The evidence also makes clear that neither Cuevas, Jackson nor Muskelly ever had any intention of purchasing the homes in question and this, too, was known by the appellant.

Appellant's efforts observed no bounds in furtherance of his goal to reap monetary gain. He utilized all of his energy to procure purchases for the three properties. He was unquestionably responsible for the impersonations of Charles Jackson, Jr., and Otha Wray Muskelly and, while appellant was always present at each of the three closings, his purchasers were often not. That appellant offered money to obtain each of the nominal buyers is not in dispute. Appellant was, to say the least, the central pivot in an unlawful money making scheme.

Appellant originally owned the property at 719A Quincy Street and collected the rents. Mrs. Malaret knew this as true and testified that County Line, appellant's company, was named as lessor on her lease. The Government proved that even after the sale to Cuevas appellant continued to financially benefit from the deal. Since Cuevas never authorized appellant to receive the rents and Cuevas never received them himself, the conclusion was inescapable that appellant retained dominion and control over the premises notwithstanding his having relinquished ownership. It was appellant who had the sole motive to effectuate the sale to Cuevas and given that fact the jury was entitled to infer that appellant was the mover and shaker in causing Cuevas' FHA application to be falsified and approved. This evidence, coupled with proof of appellant's direct illegal dealings with Cuevas, was, to say the least, sufficient to warrant a finding of guilt as charged in Count Two of the indictment.

In a like vein, the government proved beyond a reasonable doubt the charge in Count Three of the indictment. Both Mathies corroborated appellant's involvement with 668 Halsey Street and Otha Wray Muskelly. It was appellant who for a stated sum certain arranged to have Florence verify Muskelly's employment. Indeed, appellant's offer to Mr. Mathies to procure a veteran purchaser is sufficient, in and of itself, to warrant a finding of guilty. Naturally, appellant knew Muskelly; factually appellant enticed Mathies to "clean him up for the closing." When Muskelly failed to appear at the closing appellant, to insure the success of the next closing, caused Sylvester Rowe to impersonate Muskelly. That Muskelly was not the actual signatory of the closing documents was proven by expert testimony.

Charles Jackson, Jr., like Cuevas, was originally contacted by appellant with respect to his possible purchase of property located at Stewart Street, Brooklyn. He signed forms in blank for appellant on the understanding and expectation that these papers would pertain to the Stewart Street realty. Jackson never attended any closing, yet his name appeared on one of the forms pertaining to 168 Covert Street in Brooklyn. Expert testimony was adduced which proved that the preliminary papers actually signed by Jackson for appellant did not contain the same signature as the Covert Street closing papers which purportedly contained Jackson's signature. The jury was entitled to conclude from the Government's evidence that appellant was responsible at least in causing the false employment verification of Jackson to be filed with FHA.

In short, none of the purchasers had anything to gain in their transactions with appellant. Cuevas was not even aware that he owned his house; Muskelly never even completed the deal; Jackson was not even part of the scheme—he wound up in the Covert Street transaction strictly by accident. The jury, having heard substantial

evidence that appellant had executed, without authority, numerous documents in the names of others, that he himself often used diversed names including even "Algis J. Jurgela", his birth name (389-390), and proof that in all likelihood the employment verifications of Jackson and Cuevas were signed by them in blank, had every reason to conclude that appellant was the key participant in their falsifications. The verdict that false statements were made to the FHA and VA, knowing them to be false for the purpose of influencing these organizations to issue insurance and that appellant was a pivotal participant in these crimes cannot be overturned. See *United States* v. *Leach*, 427 F.2d 1107 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970).

POINT III

Testimony of appellant's participation in the rental and sales of the properties in question was relevant and entirely proper.

Appellant contends that various rent receipts shown by the Government to witnesses Cuevas and Bony were both irrelevant and intentionally utilized to "inflame a prejudice" against appellant (Appellant's Brief at 12). In addition, he urges that a list of addresses shown to Frank Mathies confused the jury (Id.) and that the receipt in evidence of Phyllis Malaret's original lease at 719A Quincy Street was likewise improper. Appellant also challenges the F.B.I. handwriting expert's testimony as having been "inaccurate and inconclusive" (Id.). Appellant made no such objections at trial and, for this reason alone, he should be precluded from raising these issues here. In any event, each of these arguments is frivolous since unsupported by the record in this case.

During the course of the testimony of Guillermo Cuevas, the Government questioned him with respect to rent receipts purportedly received by him from tenants at 719A Quincy Street (171-173). Seven 1973 receipts

from Ruth Bony, a tenant in the above premises, were shown to Cuevas; each had Cuevas' name on them but Cuevas denied the authenticity of his signature on each. Thereafter, four 1972 receipts from Ruth Bony were shown to Cuevas (A. 9). One receipt was jointly signed by the witness and "A. Gale." Cuevas likewise denied execution of this paper and all of the other receipts shown him at the trial. Cuevas explicitly testified that he never executed the receipts, nor did he ever authorize anyone, including appellant, to sign his name.

The purpose of this showing was clear. The Government proved that despite the fact that Cuevas had purchased the premises on Quincy Street on May 20, 1971 it was appellant who continued to exercise dominion and control over the realty by collecting rent and profiting therefrom. Ruth Bony herself later confirmed that she always paid rent to appellant and that often he signed Cuevas' name to the receipts (204-208). This proof was obviously relevant in that it is explained in part the true object of appellant's monetary scheme (see *infra*, Point II) and weighed heavily against the credibility of appellant who claimed, through his Grand Jury testimony, that he always turned the rent proceeds over to Cuevas after having allegedly received Cuevas' prior permission to collect them (121). Obviously, in view of the unassailable relevance of the proof, appellant's argument is baseless.

Moreover, the address list shown to Mathies (190-1) and the admission of Bony's lease into evidence (241-5), contrary to appellant's assertions, did serve "useful purposes".[7] The list refreshed Mathies' recollection that appellant instructed him to use the name "George Stone" on a number of occasions when he was collecting rent for appellant. Bony's lease showed that "A. J. Gale" was

---

[7] Apparently the address list was used to refresh Mathies' recollection (246). While the document was never offered in evidence, defense counsel interposed no objection to it being shown.

the signatory for the owner of the premises, County Collateral. The jury was entitled to weigh this evidence on the issues of appellant's deep and long standing involvement with the properties in question and his motive and intent to participate in the submission of false statements to FHA and the VA. Indeed "George Stone" was the seller's signatory of the Covert Street Property and the name "A. J. Gale" appeared as owner of the Quincy Street property (189-192). To say that these items of proof resulted in jury confusion borders on the absurd.

Appellant's criticism of the FBI handwriting experts is equally unfounded. Agent Avignone was qualified as an expert and explained in great detail his scientific processes (298-313). Appellant's charge that the FBI tests were "made beyond the maximum and were in effect delinquent" (Appellant's Brief at 12) grossly misstates the true testimony. This "delinquency" only pertained to internal FBI procedures as to the proper length of time for an agent to complete his labors on a particular job (313). Avignone's testimony, rather than "inconclusive" and "collateral", was quite relevant and scientifically grounded.

POINT IV

Appellant has failed to show any justifiable reason to warrant dismissal of this indictment for alleged preindictment delay.

Appellant asserts that, because the Government charged him with participation in crimes committed in 1971 and 1972, and the indictment was filed on July 2, 1974, the indictment should have been dismissed. In support of this contention appellant advances the bald claim that he was prejudiced by the time lapse between the date of the offenses and the return of the indictment.

Thus, so the argument goes, appellant was unable to recall the events attending each closing or the whereabouts of particular persons on the days in question. (Appellant's Brief at 19). Appellant further argues that, absent a showing that the purported "delay" was attributable to some legitimate reason, this time lapse between the date of the offenses and indictment, in and of itself, is sufficient to support the inference that the Government improperly obtained an unfair tactical advantage; and, he was denied a fair trial.

Even assuming *arguendo* that there was delay in the return of the indictment, it is submitted that such delay is not the kind of delay that would warrant a dismissal of the indictment.

In *United States* v. *Marion*, 404 U.S. 307 (1971), the Supreme Court enunciated, we believe, a dual test to determine whether pre-indictment delay, such as that claimed here, warrants dismissal of an indictment. Thus, before the defense may prevail on its claim, it must establish (i) that it has been *actually* prejudiced by the delay; and, (ii) the delay was part of an intentional plan by the Government to gain an unfair tactical advantage. Needless to say, appellant has failed to carry his burden.[8]

---

[8] Although this Court has not definitively decided the issue (See, e.g., *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975); *United States* v. *Foddrell*, 523 F.2d 86 (2d Cir. 1975), the intent of *Marion* seems clear; that both "actual prejudice" and an affirmative plan on the part of the prosecution to foster the delay in order to obtain an unfair tactical advantage must be proven before an indictment will be dismissed. *United States* v. *Brasco*, 516 F.2d 816 (2d Cir. 1975); *United States* v. *Brown*, 511 F.2d 920, 923 (2d Cir. 1975). Indeed, appellant himself concedes the accuracy of this interpretation. See Appellant's Brief at 18.

Appellant seems to assert in the main that because time has passed since the periods contained in the indictment, dates from January 5, 1971 through March 21, 1972, he was *ipso facto* prejudiced. He argues that because of the time lag he was unable to fully reconstruct the circumstances of each closing in question. Since appellant has failed to make a demonstrable showing to substantiate this claim, in reality his argument must be characterized as stating a mere possibility of prejudice.

Marion specifically rejected the argument that such a "possibility of prejudice" (id., at 322) arising from a preindictment delay in prosecution is sufficient to invoke the speedy trial protections of the Sixth Amendment. Sufficient protection was available, the Court observed, through statutes of limitation (id., at 323). Indeed, the Court recognized that such an extension of the guarantee would "create procedural problems", that "'[a]llowing inquiry into when the police could have arrested *or when the prosecutor could have charged* would raise difficult problems of proof'", and that "'the Court would be engaged in lengthy hearings in every case to determine whether or not the prosecution authorities had proceeded diligently or otherwise'" (id., at 321 n. 13) [emphasis supplied].

Marion, responding to precisely this line of reasoning, stated:

> "Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses and otherwise interfere with his ability to defend himself. But this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context. Possible prejudice is inherent in any delay, however short; it may also weaken the Government's case." Id., at 321-322.

In short, appellant's naked claim that he was "severely" prejudiced is specious. This Court has clearly stated that a mere lapse of memory is not the kind of prejudice proscribed by *Marion*. See *United States* v. *Finkelstein*, 526 F.2d 517, 525-26 (2d Cir. 1975); *United States* v. *Foddrell*, 523 F.2d 86, 87 (2d Cir. 1975). See also *United States* v. *Ianelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972), where this Court remarked that defendants claiming a violation of the Due Process Clause by reason of pre-indictment delay ". . . must at least show that they suffered actual prejudice in preparing a defense." Accord: *United States* v. *McClure*, 473 F.2d 81, 83 (D.C. Cir. 1972).

In an effort to satisfy the second prong of Marion, appellant urges that this Court has no choice but to *infer* an evil motive on the part of the Government simply because the case was not indicted at or about the time of the relevant events. He reasons, quite disingenuously, that "since the prosecution's case at trial was based primarily on documentary evidence there is no legitimate reason why the government should have waited three years to institute a prosecution" (Appellant Brief at 18). This argument is not only directly contrary to applicable decisional authority, but contradicts appellant's earlier claim that he was prejudiced in his ability to prepare a proper defense because of lack of memory. If this claim were credited it would, in large measure, obviate the necessity for statutes of limitation, although Marion is cited to that end by appellant:

> "The law has provided other mechanisms to guard against possible, as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge. As we said in United States v. Ewell [citation] 'the applicable statute of limitation . . . is . . . the primary guarantee against bringing overly stale criminal charges.'" *Marion, supra* at 322.

See *United States* v. *Mallah*, 503 F.2d 971 (2d Cir. 1974) wherein this Court stated: ". . . we do not believe that where there has been no showing of prejudice this exercise of prosecutorial discretion is the type of action which the *Marion* court had in mind when it suggested that preindictment delay might invalidate a conviction if that delay were designed 'to harass' a defendant" (emphasis supplied); see also *United States* v. *Castellanos*, 478 F.2d 749, 753 n.4 (2d Cir. 1973); *United States* v. *Handel*, 464 F.2d 679, 680-681 (2d Cir.), *cert. denied*, 409 U.S. 984 (1972); *United States* v. *Ianelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972); *United States* v. *Ruisi*, 460 F.2d 153, 157 (2d Cir.), *cert. denied*, 409 U.S. 914 (1972); *United States* v. *Briggs*, 457 F.2d 908, 911 (2d Cir.), *cert. denied*, 408 U.S. 961 (1972); *United States* v. *Wenger*, 455 F.2d 308, 310 (2d Cir.), *cert. denied*, 407 U.S. 920 (1972).

Although appellant does not claim when he became aware of the supposed delay, the record is clear that no mention whatsoever was made of it during or after the trial. It would therefore seem that since appellant's claim of pre-indictment delay was not raised before trial, it was clearly waived.[9] Cf. *United States* v. *Mauro*, 507 F.2d 802 (2d Cir. 1975); *United States* v. *Favolaro*, 493 F.2d 623, 626 (2d Cir. 1974); *United States* v. *Infanti*, 474 F.2d 523, 528 (2d Cir. 1973). Appellant had ample opportunity through the use of discovery and his rights to particulars to ascertain that there might be such an issue in this case. Moreover, it was also absolutely clear from the indictment itself that more than three years had elapsed between some of the dates alleged and the

---

[9] The defense did move after trial to dismiss the indictment on the ground, among other things, that it violated the respective statutes of limitation. The motion was denied by the Court on August 14, 1975.

time of filing. Given these facts appellant should not now be heard to complain of a matter not timely raised below.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: March 8, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
STANLEY A. TEITLER,
Assistant United States Attorneys,
Of Counsel.

★ U. S. Government Printing Office 1976—614—353—189

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 11th day of March, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Harold L. Goerlich, Esq.
380 No. Broadway
Jericho, N.Y. 11753

Evelyn Cohen

Sworn to before me this
11th day of March 1976

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1977

KE NOTICE that the within
d for settlement and signa-
k of the United States Dis-
is office at the U. S. Court-
man Plaza East, Brooklyn,
e ____ day of _____,
o'clock in the forenoon.

, New York,
_____, 19____

_____
States Attorney,
for _____

_____
_____
_____
_____

E NOTICE that the within
f _____duly entered
_ day of _____
in the office of the Clerk of
t Court for the Eastern Dis-
rk,
, New York,
_____, 19____
_____
States Attorney,
for _____

_____
_____
_____
_____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-8-73-7355